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10 Edmund G. Brown Jr., Attorney General of the State
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11

12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 **PEOPLE OF THE STATE OF CALIFORNIA**
16 ***ex rel.* EDMUND G. BROWN JR.,**
17 **ATTORNEY GENERAL OF THE STATE OF**
CALIFORNIA,

18 Plaintiff,

19 v.

20 **ENVIRONMENTAL PROTECTION**
21 **AGENCY,**

22 Defendant.

Case No.: C 08-00735 SC

SECOND DECLARATION OF
LAURA J. ZUCKERMAN IN
SUPPORT OF PLAINTIFF'S
MOTION FOR VAUGHN INDEX

Date: April 25, 2008

Time: 10:00 a.m.

Place: Courtroom 1, 17th Floor

Judge: Hon. Samuel Conti

1 I, LAURA J. ZUCKERMAN, declare as follows:

2 1. I am a Deputy Attorney General and one of counsel of record in this matter. This
3 declaration is based on personal knowledge, and if called as a witness I could and would testify
4 competently to the facts set forth herein.

5 2. Attached as Exhibit A is a true and correct copy of a letter dated March 31, 2008 from
6 Larry F. Gottesman of the United States Environmental Protection Agency that was faxed to me
7 on April 1, 2008.

8 3. Attached as Exhibit B is a true and correct copy of an order filed April 10, 2008 in
9 *State of California v. United States Environmental Protection Agency*, No. 08-70011 (9th Cir.
10 Jan. 2, 2008). Pursuant to FED. R. EVID. 201, plaintiff hereby requests that the Court take
11 judicial notice of this court-filed order and its contents, as they are “capable of accurate and
12 ready determination by resort to sources whose accuracy cannot reasonably be questioned.”
13 FED. R. EVID. 201(b).

14 4. Attached as Exhibit C is a true and correct copy of Order Re Motion For A Vaughn
15 Index filed in *People of the State of California ex rel. Bill Lockyer, Attorney General of the State*
16 *of California v. Federal Energy Regulatory Commission*, Case No. C02-0478 TEH. Pursuant to
17 FED. R. EVID. 201, plaintiff hereby requests that the Court take judicial notice of this court-filed
18 order and its contents, as they are “capable of accurate and ready determination by resort to
19 sources whose accuracy cannot reasonably be questioned.” FED. R. EVID. 201(b). This order is
20 not designated “NOT FOR CITATION” pursuant to Civil L.R. 3-4(e).

21 5. EPA has not told plaintiff that its FOIA request was unclear, and the parties are not
22 discussing clarifying or narrowing plaintiff’s request. EPA did not request prior to the filing of
23 the complaint that the parameters of plaintiff’s request be narrowed.

24 I declare under penalty of perjury that the foregoing is true and correct.

25 Executed on April 11, 2008.

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_____/S/ LAURA J. ZUCKERMAN

EXHIBIT A



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

March 31, 2008

OFFICE OF
ENVIRONMENTAL INFORMATION

Ms. Laura Zuckerman
Deputy Attorney General
Environment Section
California Department of Justice
1515 Clay Street, 20th Floor
Oakland, CA 94612

RE: Freedom of Information Act Request Number HQ-RIN-00540-08

Dear Ms. Zuckerman:

I am writing to inform you that the Environmental Protection Agency's (EPA's or Agency's) initial response to your Freedom of Information Act (FOIA) request for documents pertaining to a copy of records regarding the denial of the State of California's GHG waiver request is delayed because of "unusual circumstances." In response to numerous FOIA requests and requests from Congressional committees for documents related to the California Air Resources Board's request for a waiver of federal preemption under section 209(b) of the Clean Air Act, the Agency searched several EPA headquarters and regional offices to locate records responsive to these requests. The search produced a voluminous number of responsive records, and each record needed to be reviewed to determine whether it was exempt from disclosure under the FOIA. The Agency determined that several thousand records were not exempt from disclosure under FOIA and should be made publicly available. The Agency intends to make these frequently requested documents available to the public on the EPA Website by late April.

If you have any questions, please contact me on 202-566-2162.

Sincerely,

Larry F. Gottesman

Larry F. Gottesman
National FOIA Officer

EXHIBIT B

FILED

UNITED STATES COURT OF APPEALS

APR 10 2008

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

STATE OF CALIFORNIA, by and
through ARNOLD
SCHWARZENEGGER, GOVERNOR OF
THE STATE OF CALIFORNIA, the
CALIFORNIA AIR RESOURCES
BOARD, and EDMUND G. BROWN, JR.,
ATTORNEY GENERAL OF THE STATE
OF CALIFORNIA,

No. 08-70011

Petitioner,

WASHINGTON ENVIRONMENTAL
COUNCIL; et al.,

Petitioners-Intervenors,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent,

ALLIANCE OF AUTOMOBILE
MANUFACTURERS,

Respondent-Intervenor.

Respondents and respondent-intervenor's motions to dismiss these appeals for lack of jurisdiction are denied without prejudice to raising the arguments in the answering brief. *See Nat'l Indus. v. Republic Nat'l Life Ins. Co.*, 677 F.2d 1258, 1262 (9th Cir. 1982) (stating that merits panel may consider appellate jurisdiction despite earlier denial of motion to dismiss).

All pending motions for leave to intervene will be addressed by separate order.

The following briefing schedule shall govern these consolidated appeals: the opening briefs and excerpts of record are due May 14, 2008; the answering briefs are due June 16, 2008; and the optional reply briefs are due within 14 days after service of the last-served answering brief.

All parties on a side are encouraged to join in a single brief to the greatest extent practicable. *See* 9th Cir. R. 28-4.

EXHIBIT C

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF
CALIFORNIA *ex rel.* BILL
LOCYER, ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

FEDERAL ENERGY
REGULATORY COMMISSION,

Defendant.

NO. C02-0478 TEH

ORDER RE MOTION FOR
A VAUGHN INDEX

This matter comes before the Court on plaintiff's Motion for a *Vaughn* Index. Having carefully considered the parties' papers and the record herein, the motion is granted as set forth below.

DISCUSSION

On June 25, 2001, plaintiff filed its request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* ("FOIA"). On February 8, 2002 -- two weeks after the filing of this lawsuit on January 25, 2002-- defendant Federal Energy Regulatory Commission ("FERC") responded to plaintiff's FOIA request by stating that there are a large number of

1 documents, falling within 17 separate categories, that may be responsive to the request.
2 FERC further stated, however, that with the exception of a single document, all of the
3 requested documents fall within FOIA exemptions 7(A) and (E), 5 U.S.C. §§ 522(b)(7)(A),
4 (E). With regard to the single document, "an Operation and Maintenance Agreement
5 between Southern California Edison and AES Huntington Beach," FERC stated that it
6 intends to release the document "no less than five days from the date of this letter." See
7 Zuckerman Decl., Exh A.¹

8 On January 25, 2002, plaintiff filed the instant Motion for a *Vaughn* Index, noticed for
9 March 6, 2002 before Magistrate Judge Larson. FERC subsequently declined to consent to
10 jurisdiction before a magistrate judge and the action was reassigned to the undersigned.
11 Plaintiff's motion was then re-noticed for March 11, 2002.

12 FERC does "not object to the filing of a *Vaughn* Index," Def's Opp. at 1, and indeed
13 such an index is generally required under the circumstances present here. See *Wiener v.*
14 *Federal Bureau of Investigation*, 943 F.2d 972, 977-78 (9th Cir. 1991); *Vaughn v. Rosen*, 484
15 F.2d 820 (D.C. Cir. 1973). Nor does FERC object to that portion of plaintiff's proposed
16 order which, consistent with *Vaughn* and *Wiener*, requires FERC to provide detailed
17 information regarding each document and the justification for its withholding.

18 The parties dispute, however, the timing of the Index. Plaintiff asks that the Court
19 order FERC to serve and file the Index by March 13, 2002, two days after the scheduled
20 hearing, while FERC argues that it should be permitted to delay submission of the Index until
21 its files a summary judgment motion at some point in the future. FERC provides no
22 justification for its approach, and it appears contrary to Congress' intent that FOIA matters
23 be addressed as promptly as possible. *Coastal States Gas Corp. v. Dep't of Energy*, 644 F.2d
24 969, 972 (3rd Cir. 1981) (FOIA "embodies a policy of expedited handling of requests for
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27 As of February 20, 2002, the date of plaintiff's reply brief, plaintiff had still not
28 received this one document. On February 26, 2002, plaintiff wrote a letter informing
the Court that it received the document on February 22, 2002.

1 documents"). As plaintiff notes, prompt production of the Index prior to summary judgment
2 proceedings would allow for the efficient resolution of any disputes regarding the adequacy
3 of the Index and the possible narrowing of the issues on summary judgment.

4 Significantly, FERC has offered no reason or argument as to why it could not provide
5 its *Vaughn* Index promptly. FERC necessarily identified all documents at issue no later than
6 February 8, 2002, when it responded to plaintiff's FOIA request. It has also been on notice
7 of plaintiff's motion seeking a *Vaughn* Index since January 25, 2002. The Court additionally
8 notes that events to date in this case indicate that FERC only appears to act promptly when
9 prodded by legal proceedings or the specter of imminent court action. Accordingly, the
10 Court declines FERC's invitation to delay submission of its *Vaughn* Index until some
11 undetermined date in the future. Given the large number of documents involved, however,
12 the Court will allow FERC three weeks, in addition to the time that has already elapsed, to
13 prepare the Index.

14 Good cause appearing, it is THEREFORE ORDERED as follows:

15 FERC shall serve and file its *Vaughn* Index *no later than 21 days from the date of this*
16 *Order*. Said Index shall consist of an itemized index of all those documents that are the
17 subject of this suit, indicating in detail, with respect to each document or segregable portion
18 thereof, the nature of the information contained in it and the justification for withholding it.
19 The Index shall specify, for each document, at a minimum, the following:

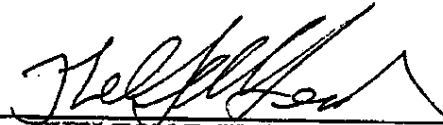
- 20 (a) The author(s) of the document, to the extent indicated in the document
- 21 (b) The date the document was prepared, to the extent indicated in the document
- 22 (c) The addressee(s) of the document, to the extent indicated in the document
- 23 (d) Any additional person(s) to whom the document was circulated or made available,
24 to the extent indicated in the document
- 25 (e) The subject matter of the document
- 26 (f) A detailed justification of the basis for each claim of exemption
- 27
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1 (g) The specific claimed injury to FERC that would result from the release of the
2 document

3 (h) Why the public interest does not favor disclosure of the document
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6 IT IS SO ORDERED.

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8 DATED 3/4/02


THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,
et al.,

Case Number: C02-0478 TEH

Plaintiff,

CERTIFICATE OF SERVICE

v.

FEDERAL ENERGY REGULATORY
COMMISSION,

Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on March 5, 2002, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Laura Zuckerman
Deputy Attorney General
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102

Steven J. Saltiel
U.S. Attorney - Civil Division
450 Golden Gate Avenue, 10th Fl.
P.O. Box 36055
San Francisco, CA 94102

Dated: March 5, 2002

Richard W. Wieking, Clerk

By: 

Deputy Clerk

EXHIBIT A

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF
CALIFORNIA *ex rel.* BILL
LOCYER, ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

FEDERAL ENERGY
REGULATORY COMMISSION,

Defendant.

NO. C02-0478 TEH

ORDER RE MOTION FOR
A VAUGHN INDEX

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DISCUSSION

On June 25, 2001, plaintiff filed its request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* ("FOIA"). On February 8, 2002 -- two weeks after the filing of this lawsuit on January 25, 2002-- defendant Federal Energy Regulatory Commission ("FERC") responded to plaintiff's FOIA request by stating that there are a large number of

1 documents, falling within 17 separate categories, that may be responsive to the request.
2 FERC further stated, however, that with the exception of a single document, all of the
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5 between Southern California Edison and AES Huntington Beach," FERC stated that it
6 intends to release the document "no less than five days from the date of this letter." See
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8 On January 25, 2002, plaintiff filed the instant Motion for a *Vaughn* Index, noticed for
9 March 6, 2002 before Magistrate Judge Larson. FERC subsequently declined to consent to
10 jurisdiction before a magistrate judge and the action was reassigned to the undersigned.
11 Plaintiff's motion was then re-noticed for March 11, 2002.

12 FERC does "not object to the filing of a *Vaughn* Index," Def's Opp. at 1, and indeed
13 such an index is generally required under the circumstances present here. See *Wiener v.*
14 *Federal Bureau of Investigation*, 943 F.2d 972, 977-78 (9th Cir. 1991); *Vaughn v. Rosén*, 484
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16 order which, consistent with *Vaughn* and *Wiener*, requires FERC to provide detailed
17 information regarding each document and the justification for its withholding.

18 The parties dispute, however, the timing of the Index. Plaintiff asks that the Court
19 order FERC to serve and file the Index by March 13, 2002, two days after the scheduled
20 hearing, while FERC argues that it should be permitted to delay submission of the Index until
21 its files a summary judgment motion at some point in the future. FERC provides no
22 justification for its approach, and it appears contrary to Congress' intent that FOIA matters
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the Court that it received the document on February 22, 2002.

documents"). As plaintiff notes, prompt production of the Index prior to summary judgment proceedings would allow for the efficient resolution of any disputes regarding the adequacy of the Index and the possible narrowing of the issues on summary judgment.

Significantly, FERC has offered no reason or argument as to why it could not provide its *Vaughn* Index promptly. FERC necessarily identified all documents at issue no later than February 8, 2002, when it responded to plaintiff's FOIA request. It has also been on notice of plaintiff's motion seeking a *Vaughn* Index since January 25, 2002. The Court additionally notes that events to date in this case indicate that FERC only appears to act promptly when prodded by legal proceedings or the specter of imminent court action. Accordingly, the Court declines FERC's invitation to delay submission of its *Vaughn* Index until some undetermined date in the future. Given the large number of documents involved, however, the Court will allow FERC three weeks, in addition to the time that has already elapsed, to prepare the Index.

Good cause appearing, it is THEREFORE ORDERED as follows:

FERC shall serve and file its *Vaughn* Index *no later than 21 days from the date of this Order*. Said Index shall consist of an itemized index of all those documents that are the subject of this suit, indicating in detail, with respect to each document or segregable portion thereof, the nature of the information contained in it and the justification for withholding it. The Index shall specify, for each document, at a minimum, the following:

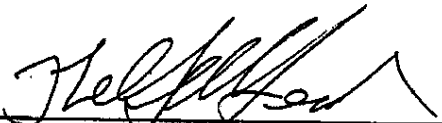
- (a) The author(s) of the document, to the extent indicated in the document
- (b) The date the document was prepared, to the extent indicated in the document
- (c) The addressee(s) of the document, to the extent indicated in the document
- (d) Any additional person(s) to whom the document was circulated or made available, to the extent indicated in the document
- (e) The subject matter of the document
- (f) A detailed justification of the basis for each claim of exemption

1 (g) The specific claimed injury to FERC that would result from the release of the
2 document

3 (h) Why the public interest does not favor disclosure of the document
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6 IT IS SO ORDERED.

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8 DATED 3/4/02


THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
FOR THE
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PEOPLE OF THE STATE OF CALIFORNIA,
et al.,

Case Number: C02-0478 TEH

Plaintiff,

CERTIFICATE OF SERVICE

v.

FEDERAL ENERGY REGULATORY
COMMISSION,

Defendant.

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That on March 5, 2002, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Laura Zuckerman
Deputy Attorney General
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102

Steven J. Saltiel
U.S. Attorney - Civil Division
450 Golden Gate Avenue, 10th Fl.
P.O. Box 36055
San Francisco, CA 94102

Dated: March 5, 2002

Richard W. Wieking, Clerk

By: 
Deputy Clerk